IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

MACON COUNTY GREYHOUND PARK, INC.'S REPLY TO MACON COUNTY INVESTMENTS, INC. AND REACH ONE, TEACH ONE OF AMERICA'S RESPONSE TO MACON COUNTY GREYHOUND PARK, INC'S MOTION TO QUASH AND/OR MODIFY SUBPOENA

COMES NOW Macon County Greyhound Park, Inc. ("MCGP") by and through its counsel of record, and hereby submits the following Reply to Macon County Investments, Inc. and Reach One, Teach One of America's ("Plaintiffs") response to MCGP's motion to quash and/or modify subpoena.

1. Plaintiffs resist MCGP's motion to quash and/or modify subpoena on numerous grounds. To begin with, Plaintiffs mistakenly contend that Rule 45 does not require personal service. In support of this proposition, Plaintiffs rely heavily upon *Hall v. Sullivan*. 229 F.R.D. 501, 503-06 (D. Md. 2005). Plaintiffs' reliance on *Hall* is problematic for use in the 11th Circuit and in this particular case. First, and as admitted in *Hall* itself, "a majority of courts have held that personal service is required." *Id*. at 502; *Barnhill v. U.S.*, 11 F.3d 1360 (7th Cir. 1993) (reversed on other grounds); *In re Edelman*, 295 F.3d 171 (2nd Cir. 2002); *Chima v. U.S. Department of Defense*, 23 Fed. Appx. 721 (9th Cir. 2001);

Whitmer v. Lavida Charter, Inc., (D.C. Pa. 1991); *In re Smith*, 126 F.R.D. 461(D.C.N.Y. 1989); *In re Motorsports Merchandise Antitrust Litigation*, 186 F.R.D. 344 (D.C. Va. 1999); *Alexander v. Jesuits of Missouri Province*, 175 F.R.D. 556 (D.C. Kan. 1997). More importantly, courts within the 11th Circuit require personal service when issuing a subpoena for a witness. *Klockner Namasco Holdings Corporation v. Daily Access.com, Inc.,* 211 F.R.D. 685, 687 (N.D. Ga. 2002); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (noting that service of subpoena must be served on the person listed and not another individual).

2. Second, even if this court finds service in a form other than personal service proper, as embodied in *Hall*, it is not applicable to the present matter. Specifically, the *Hall* court found that "'[g]iven the textual ambiguity of Rule 45, combined with the repeated attempts of the plaintiffs to effectuate personal service, and the cost and delay that would result by requiring attempts at such service . . . effective service under Rule 45 is not limited to personal service.'" *Hall*, 229 F.R.D. at 505 (quoting *Western Resources v. Union Pacific R.R.*, 2002 WL 1822432 (D. Kan. 2002) (unpublished)); *see also Hinds v. Bodie*, 1988 WL 33123 (E.D.N.Y. 1988) (noting that only after five unsuccessful attempts at personal service was an alternative form of service ordered by the court). Based on these holdings, there is a threshold of "repeated attempts . . . to effectuate personal service" before a form of service less than personal service can be used. Plaintiffs made no initial attempts to personally serve MCGP's service agent. Without these attempts, the holding in *Hall* is inapplicable and Plaintiffs' service is defective.

3. Third, the magistrate in *Hall* specifically limited the holding "to subpoenas

duces tecum which only require production of documents." 229 F.R.D. at 506. The court reasoned that "[i]n cases involving subpoenas commanding an individual to appear to testify, a legitimate argument may be made that personal service is required as the burden is greater and a failure to comply may expose the subpoenaed person to contempt sanctions." *Id*. at 506 n.6; *see also In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (holding "personal service of a subpoena is required when an individual is subpoenaed"). The subpoena issued for MCGP clearly commands MCGP's appointed representative to personally appear for deposition. As such, this places the present matter beyond the holding of *Hall* and requires personal service. Since personal service was not effectuated, Plaintiffs' subpoena is defective and should be quashed.

4. Plaintiffs contend it is MCGP's fault that their subpoena was not signed by an authorized agent. Pl. Mot. In Resp. to Quash ¶ 2. The Plaintiff specifically contends that, when sending a letter by registered mail, all they can do is properly address and mail the letter. Pl. Mot. In Resp. to Quash ¶ 2. They cannot "prevent employees of MCGP from intercepting certified mail." Pl. Mot. In Resp. to Quash ¶ 2. Plaintiffs' argument highlights exactly why service should not be directed through certified mail. Namely, it is not "reasonable," as the term is used in Rule 45, to believe a subpoena will be served on the person named in the subpoena when it is sent to an address in which many individuals have access. Beyond this, Plaintiffs returned certification would reveal that Mr. McGregor had not certified receipt. Even with this information, Plaintiffs failed to correct the defect in service.

5. Next, in arguing against the failure to include witness or mileage fees in their subpoena, Plaintiffs fail to appreciate the clear wording of Rule 45(b)(1). Plaintiffs contend

a "witness is due to receive witness and mileage fees prior to attending the deposition." Pl. Mot. In Resp. to Quash ¶ 4. While this is true, Rule 45 specifically finds service should include a tender to the person named in the subpoena for "one day's attendance and the mileage allowed by law." Fed. R. Civ. P. 45(b)(1) (2007); *see also CF & I Steel Corp. v. Mitsui & Co.*, 713 F.2d 494 (9th Cir. 1983) (holding the plain meaning of Rule 45(b)(1) calls for concurrent tender of witness fees and an *estimated* mileage allowance with service) (emphasis added).

6. In an attempt to absolve their failure to present effective service, Plaintiffs claims they had no way of knowing who MCGP's corporate representative would be and from where he would come. Pl. Mot. In Resp. to Quash ¶ 4. This argument, at best, is illogical. Again, as Rule 45(b)(1) reads, the tender of witness and mileage fees should be made for the person named in the subpoena. *Id*. Plaintiffs' subpoena solely names Milton McGregor. The language of Rule 45 makes clear the tender should be to Mr. McGregor. Furthermore, Plaintiffs' argument that they could not estimate mileage fees since they lacked knowledge of where the corporate representative would come from is circular. Of course, if Plaintiffs knew from where the corporate representative was coming, they would have no need to estimate. It appears the estimation language for mileage was implemented for just this type of situation. At a minimum, Plaintiffs could assume the corporate agent would commute to the deposition from MCGP's facilities.

7. Plaintiffs' reliance upon *PHE, Inc. v. Department of Justice* to absolve their subpoena's deficiencies is misfounded.139 F.R.D. 249 (D.D.C. 1991). In *PHE, Inc.*, the subpoena's deficiency was overcome by an actual tender of fees. *Id*. at 255. Plaintiffs have

yet to tender witness or mileage fees to the subpoenaed witness. This alone renders Plaintiffs' subpoena deficient. *Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002).

8. Plaintiff's claim that the subpoenaed information is not a trade secret and relevant is also improper. As noted in MCGP's Motion to Quash, the documents requested by Plaintiffs fall squarely under private, confidential information which qualifies as a trade secret. MCGP Mot. to Quash and/or Modify ¶ 9. The determination of whether information should be considered a trade secret is determined by state law. *See Freeport-McMoran Sulphur, LLC* v. *Mike Mullen Energy equipment Resource, Inc.*, 2004 WL 764174 *4 (E.D. La.) (determining whether documents requested through *duces tecum* subpoena were trade secrets based on Louisiana law); *Sheets v. Yamaha Motorists Corp.*, 849 F.2d 179 (5th Cir. 1988); *Wheelabrator Corp. v. Fogle*, 438 F.2d 1226, 1226 (5th Cir. 1971). Alabama defines a trade secret as information that:

> a. Is used or intended for use in a trade or business;
> b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
> c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
> d. Cannot be readily ascertained or derived from publicly available information;
> e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
> f. Has significant economic value.

Ala. Code 8-27-2(a-f) (1901). The information requested by Plaintiffs meets all these requirements. The information was created for use in MCGP's business and revenue distribution, corporate structure, ownership, etc., and qualifies as formulas, methods, and processes used by MCGP to run a successful business. As is indicated by Plaintiffs' desire to subpoena these documents, the records are not publicly known and cannot be readily ascertained from publicly available information. Finally, these records have significant economic value—especially in light of the fact Plaintiffs are competitors—because they detail MCGP's financial operations, corporate structure, and economic schemes. *See Cmedia, LLC v. Lifekey Healthcare, LLC*, 216 F.R.D. 387, 391 (N.D. Tex. 2003) (noting that affidavit that stated "information concerning terms of contracts and advertising rates would provide business advantage to competitors . . . and that disclosure of that information to . . . a competitor would damage [third party's] ability to compete" satisfied "burden to show that the information is a trade secret and that its disclosure would be harmful"). The characterization of revenue and confidential contracts as trade secrets is widely supported. *Echostar Communications Corp. v. The News Corp. Ltd.* 180 F.R.D. at 391 (finding document requests relating to "'revenue projections, price forecasts, pricing options, evaluations of proposed capital structures and analyses,'" sought "information which would ordinarily fall within the definition of 'trade secret'"); *Delucca v. GGL Industries, Inc.*, 712 So.2d 1186, 1187 (Crt. App. Fl. 1998) (finding a company's business documents, which included tax returns, documents reflecting income, and customer's names and addresses, constituted "trade secrets" under Florida law).

9. Since the documents requested are trade secrets, they receive heightened protection and Plaintiffs must "show that the requested information is relevant and necessary" to command disclosure under a *duces tecum* subpoena. *Echostar Communications Corp.*, 180 F.R.D. at 395. The material requested is neither relevant nor necessary for Plaintiffs' case.

10. First, the materials requested by Plaintiffs are not relevant to their underlying cause of action. *Ex Parte Miltope Corp.*, 823 So.2d 640,643 (Ala. 2001) ("[A] court must consider the nature of the plaintiffs' claim and whether, in light of the claim, the plaintiffs has demonstrated a particularized need for the discovery being sought."). Plaintiffs' complaint in the present proceedings enumerates a single Equal Protection claim. The economic condition of MCGP or its contractual relationship with non-profit organizations is not relevant nor will it reasonably tend to lead to relevant information to help Plaintiffs prove their Equal Protection claim against Sheriff Warren. By definition this makes the material requested irrelevant. *United Technologies Corp. v. Mazer*, 2007 WL 788877 *2 (S.D.Fla. 2007) ("As [the third party] is no longer a defendant in this matter, documents relating to stock ownership are irrelevant."); *United Technologies Corp.*, 2007 WL 788877 at 2 (noting that even if documents "relate to the alleged relationship between" a party and non-party, those documents are not relevant if that relationship "is not necessary for Plaintiffs to prove any of the elements of its case").

11. Plaintiffs next attempt to establish relevance by claiming a substantial need or necessity for the materials requested because the materials "will demonstrate the enormous amounts of revenue that are being generated by the operation of the bingo facility operated by MCGP." Pl. Mot. In Resp. to Quash ¶ 4. By its own admission, Plaintiffs' sole purpose in seeking financial records is to determine MCGP's financial worth so as to implicate bad faith on the part of Defendant Warren. Pl. Mot. In Resp. to Quash ¶ 4.This very reasoning has been rejected and deemed an improper "fishing expedition" by other courts. *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78

(S.D.N.Y. 2002) (noting Magistrate Judge properly quashed subpoena demanding "third party monthly bank statements" because it was a "fishing expedition" looking for large deposits by key decision-makers involved in litigation); *Echostar Communications Corp. v. The News Corp. Ltd.*, 180 F.R.D. 391, 395 (D. CO. 1998) ("'It is axiomatic that a party cannot take [discovery] for purposes unrelated to the lawsuit at hand.'") (internal citation omitted)); *Catskill Development, L.L.C.*, 206 F.R.D. at 78 (noting the use of a *duces tecum* subpoena as a prosecutorial tool is inappropriate in a civil lawsuit); *Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.*, 262 F.Supp.2d 923, 92 (N.D. Ill. 2003) ("When the purpose of the discovery is to obtain information for reasons other than the prosecution or defense of the lawsuit, unless vital information is at stake, discovery will be denied in its entirety.") Since the materials requested by Plaintiffs are not relevant, their subpoena is due to be quashed.

12. Even if there is some relevance in Plaintiffs' request, it fails to overcome the case-specific balancing test used in the 11th Circuit. *Farnsworth v. Proctor & Gamble Co.*, 758 F. 2d 1545, 1547 (11th Cir. 1985). As a preliminary matter, it should be noted, and in opposition to Plaintiffs' assertion that "MCGP is squarely in the middle of this case", Pl. Mot. In Resp. to Quash ¶ 4, Rule 45 makes no delineation between varying degrees of non-parties. As such, "the status of a person or entity as a non-party is a factor which weighs against disclosure." *Echostar Communications Corp.*, 180 F.R.D. at 394 (*citing American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987)). Since the materials requested are wholly irrelevant to the claims asserted in Plaintiffs' case, Plaintiffs cannot show the substantial need required in acquiring trade secrets from a third party.

Even if this Court found the documents to have some marginal relevance to Plaintiffs' claims, that alone is insufficient to support the subpoena here. *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, 2007 WL 852521 *6 (D. Kan.) (noting "[t]he necessity of the information sought has also not been shown . . . because the requested information is not central to the litigation because of its minimal relevance.")

13. Plaintiffs' substantial need is further lacking since Plaintiffs have yet to exhaust all attempts at acquiring the requested materials from Defendant Warren. Plaintiffs frankly admit they "have previously requested some of [the] same information directly from Defendant Warren, but the information has yet to be received." Pl. Mot. In Resp. to Quash ¶ 4. Instead of seeking to obtain discovery from a party, Plaintiffs seeks to obtain those documents from a non-party. This is in clear contradiction to Rule 45(c) which provides that "[a] party or an attorney responsible for the issuance of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Fed. R. Civ. Pr. 45(c). This allows the Court to "consider whether information should be obtained by direct discovery from a party, as opposed to from a non-party, and that the court should give special weight to the unwanted burden thrust upon non-parties when evaluating the balance of competing needs." *Medical Components, Inc. v. Classic Medical, Inc.*, 210 F.R.D. 175, 180 n.9 (M.D.N.C. 2002). It is altogether improper for Plaintiffs to subpoena materials from MCGP when they have yet to show that the materials are unavailable from a party. *Echostar Communications Corp*, 180 F.R.D. at 396 ("Until Echostar has exhausted its efforts to seek production of these types of materials from News Corp, and until Echostar has, at least completed some depositions, it cannot even

begin to argue that it has a substantial need to obtain the materials from the non-parties.").

14. Finally, Plaintiffs are potential competitors of MCGP. The potential harm inherent in MCGP's disclosure of financial records and capital and corporate structure to a competitor in light of their at best tangential relevance far outweighs Plaintiffs' need. *Echostar Communications Corp. v. The News Corp. Ltd.*, 180 F.R.D. at 395 ("[T]he potential harm which would occur from disclosure of [trade secrets that include revenue projections, price forecasts, pricing options, evaluations of proposed capital structures and analyses] far outweighs [Plaintiffs'] stated needs for it.").

15. Based on applicable standards of this circuit and for the foregoing reasons, Plaintiffs' subpoena is due to be quashed.

Respectfully submitted,

s/John M. Bolton, III
s/Charlanna W. Spencer
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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth L. Thomas, Esq.
Christopher K. Whitehead, Esq.
Gary A. Grasso, Esq.
Adam R. Bowers, Esq.
Fred D. Gray, Esq.
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And I certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

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